

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
May 24, 2006 Session

BERNARD GRAY v. SHONEY'S, LLC, f/d/b/a SHONEY'S, INC.

**Appeal from the Chancery Court for Davidson County
No. 02-2972-III Ellen Hobbs Lyle, Chancellor**

No. M2005-00923-COA-R3-CV - Filed October 31, 2006

This appeal concerns the respective rights of a former executive employee and his employer arising from a Management Retention Agreement. The issue is whether the former executive, who voluntarily terminated his employment for what he claimed to be good cause, as defined in the Management Retention Agreement, is entitled to severance compensation. The agreement afforded the executive the right to voluntarily terminate his employment, for which he would be entitled to receive severance compensation, if a significant change in the nature or scope of his authority as an executive occurred. Contending the conditions precedent occurred, the executive terminated his employment and made a demand for the severance compensation. When the employer denied the claim, the executive filed this action. Following discovery, the executive moved for summary judgment. The trial court granted the motion finding the material facts were not in dispute concerning whether good cause existed, specifically whether a significant change in the nature or scope of the executive's authority had occurred, and the executive was entitled to severance compensation. The employer appeals contending summary judgment was improper. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which WILLIAM B. CAIN and PATRICIA J. COTTRELL, JJ., joined.

Matthew J. Sweeney and April Y. Berman, Nashville, Tennessee, for the appellant, Shoney's, LLC.

John P. Branham and Rebecca C. Blair, Brentwood, Tennessee, for the appellee, Bernard Gray.

OPINION

Bernard Gray, former Chief Information Officer of Shoney's, Inc., is seeking to recover compensation benefits he contends he is entitled to receive pursuant to a Management Retention Agreement he entered into with Shoney's, Inc.¹

In 2000, Shoney's was experiencing financial difficulties and facing the prospect of a change of control in the form of an acquisition by another company. Realizing its executive employees may be inclined to seek employment elsewhere due to uncertainties presented by a change of control at the corporate level, which would further weaken the company, Shoney's implemented a management retention plan. Pursuant to its plan, Shoney's offered certain executive employees the option of entering into a Management Retention Agreement, the purpose of which was to induce the executive to remain with Shoney's through the turbulent times. It afforded the executive a liberal severance package if, within two years of a change in control,² as defined in the Management Retention Agreement, the executive voluntarily terminated his employment for good reason, which is also defined in the Management Retention Agreement.

In June of 2000, Gray and Shoney's entered into the Management Retention Agreement (Agreement). The relevant portions of the Agreement provided that Gray would be entitled to receive severance compensation if events occurred that gave him good reason to terminate his employment. As the Agreement provided, Gray would have "Good Reason" to terminate his employment if:

- (i) there is a significant change in the nature or the scope of Executive's authority; [or]

¹ Gray was initially hired by Shoney's in 1994 as head of Information Services. He quit several years later but rejoined Shoney's once again as Chief Information Officer after only a few months. Other than during this brief absence Gray was Chief Information Officer from 1994 until his resignation in August 2002.

² Section 14 (c) of the Management Retention Agreement defines "Change in Control" as: (i) if any person or entity, including a "group" as defined in Section 13(d)(3) of the Exchange Act, other than a group of which executive is a member or affiliate, Employer or a wholly-owned subsidiary thereof or any employee benefit plan of Employer or any of its subsidiaries, becomes the beneficial owner of Employer securities having 50% more of the combined voting power of the then outstanding securities of Employer that may be cast for the election of directors or Employer; or (ii) as the result of, or in connection with, any cash tender or exchange offer, merger or other business combination, sale of substantially all of the assets or contested election, or any combination of the foregoing transactions less than a majority of the combined voting power of the then-outstanding securities of Employer or any successor corporation or entity entitled to vote generally in the election of the directors of the Employer or such other corporation or entity is held in the aggregate after such transaction by the holders of Employer securities entitled to vote generally in the election of directors of Employer immediately prior to such transaction; or (iii) following the date of this Agreement, individuals who on such date constitute the Board of Directors of Employer cease for any reason to constitute at least a majority thereof, unless the election, or the nomination for election by Employer's shareholders, of each director of Employer first elected following such date was approved by a vote of at least two-thirds of the directors of Employer then still in office who were directors on the date of this Agreement.

- (iv) there is a reasonable determination by Executive that, as a result of a change in circumstances significantly affecting his or her position, Executive is unable to exercise the authority, powers, function or duties attached to his or her position.

In April of 2002, Shoney's was acquired by Two Step Partners, L.P., an affiliate of Lone Star Funds and U.S. Restaurant Properties, Inc. It is undisputed that this acquisition constituted a change in control as defined by the Agreement, being one of the conditions precedent to Gray being entitled to terminate his employment and receive severance compensation. After the change of control occurred, Gray contends significant changes occurred in the nature and scope of his authority resulting in his inability to exercise the authority, powers, function or duties attached to his position as Chief Information Officer, which constituted good cause for him to terminate his employment.

Prior to the change of control in April of 2002, Shoney's, Inc. was the parent organization of Shoney's Restaurants and Captain D's Restaurants. Prior to the change of control Gray reported directly to the Chairman of the Board of the parent organization, Shoney's Inc., but after the acquisition by Two Step Partners, L.P., Gray and his department, Information Services, were "redeployed" to a subsidiary, Captain D's. As a result of the organizational change, Gray reported to the Operations President of the subsidiary, Captain D's, rather than directly to the Chairman of the Board of the parent company, Shoney's, Inc., which he did before Two Step Partners, L.P. acquired the company.

In addition to the above changes, Gray believed he lost autonomy and authority he previously held as Chief Information Officer of Shoney's, Inc. and as a result of post-acquisition changes, he was required to obtain authorization from other executives to purchase new equipment and sell used equipment, and to initiate research and development opportunities. Furthermore, Gray noted that the software programmers were removed from Gray's supervision, and supervision of the customer complaint line and Mystery Shopper program was transferred to others.

In July of 2002, Gray gave notice that he was voluntarily terminating his employment effective August 9, 2002. He claimed that he had "Good Reason," as defined by Section 14(f)(i) and (iv) of the Agreement and requested the severance compensation. Shoney's took issue with Gray's assessment of the changes and denied his claim for severance. This action followed, Gray prevailed on summary judgment, and Shoney's appealed.

On appeal, Shoney's contends the trial court: (1) improperly applied the summary judgment standard in ruling on Gray's motion for partial summary judgment on the issue of liability; (2) erred by finding, as a matter of law, that there was a significant change in the nature or scope of Gray's authority that entitled Gray to receive severance under the terms of the Management Retention Agreement; and (3) erred by finding, as a matter of law, that Gray was entitled to receive severance under the terms of the Management Retention Agreement due to his reasonable determination that, as a result of a change of circumstances significantly affecting his position with Shoney's, he was unable to exercise the authority, powers, functions or duties attached to his person.

STANDARD OF REVIEW

The issues were resolved in the trial court upon summary judgment. Summary judgments do not enjoy a presumption of correctness on appeal. *BellSouth Advertising & Publishing Co. v. Johnson*, 100 S.W.3d 202, 205 (Tenn. 2003). This court must make a fresh determination that the requirements of Tenn. R. Civ. P. 56 have been satisfied. *Hunter v. Brown*, 955 S.W.2d 49, 50-51 (Tenn. 1997). We consider the evidence in the light most favorable to the non-moving party and resolve all inferences in that party's favor. *Godfrey v. Ruiz*, 90 S.W.3d 692, 695 (Tenn. 2002). When reviewing the evidence, we first determine whether factual disputes exist. If a factual dispute exists, we then determine whether the fact is material to the claim or defense upon which the summary judgment is predicated and whether the disputed fact creates a genuine issue for trial. *Byrd v. Hall*, 847 S.W.2d 208, 214 (Tenn. 1993); *Rutherford v. Polar Tank Trailer, Inc.*, 978 S.W.2d 102, 104 (Tenn. Ct. App. 1998).

Summary judgments are proper in virtually all civil cases that can be resolved on the basis of legal issues alone, *Byrd v. Hall*, 847 S.W.2d at 210; *Pendleton v. Mills*, 73 S.W.3d 115, 121 (Tenn. Ct. App. 2001); however, they are not appropriate when genuine disputes regarding material facts exist. Tenn. R. Civ. P. 56.04. The party seeking a summary judgment bears the burden of demonstrating that no genuine disputes of material fact exist and that party is entitled to judgment as a matter of law. *Godfrey v. Ruiz*, 90 S.W.3d at 695. Summary judgment should be granted at the trial court level when the undisputed facts, and the inferences reasonably drawn from the undisputed facts, support one conclusion, which is the party seeking the summary judgment is entitled to a judgment as a matter of law. *Pero's Steak & Spaghetti House v. Lee*, 90 S.W.3d 614, 620 (Tenn. 2002); *Webber v. State Farm Mut. Auto. Ins. Co.*, 49 S.W.3d 265, 269 (Tenn. 2001). The court must take the strongest legitimate view of the evidence in favor of the non-moving party, allow all reasonable inferences in favor of that party, discard all countervailing evidence, and, if there is a dispute as to any material fact or if there is any doubt as to the existence of a material fact, summary judgment cannot be granted. *Byrd v. Hall*, 847 S.W.2d at 210; *EVCO Corp. v. Ross*, 528 S.W.2d 20 (Tenn. 1975).

ANALYSIS

The issue before the court is whether genuine disputes regarding material facts exist as to the “good reasons” Gray contends he is entitled to terminate his employment.

The Agreement provides that Gray shall have “good reason” to terminate his employment if, subsequent to a change of control of the company, Shoney’s makes a significant change in the nature or scope of Gray’s authority; or if Gray made a reasonable determination that as a result of a change of circumstances significantly affecting his position he was unable to exercise his authority, powers, function, or duties as an executive. Although the two good reasons stated above appear similar, they are distinct. Therefore, we will analyze them separately to determine if Gray is entitled to summary judgment, realizing that Gray is entitled to summary judgment if he prevails on either of the two good reasons.

Interpretation of a written contract, such as a Management Retention Agreement, is a matter of law to be decided by the court. *Planters Gin Co. v. Fed. Compress & Warehouse Co., Inc.*, 78 S.W.3d 885, 890 (Tenn. 2002). To interpret the contract, we look within the four corners of the contract and the circumstances surrounding its formation to determine the intent of the parties and interpret the meaning of its content, such as the meaning of the word “significant” as used in the Agreement. *Realty Shop, Inc. v. RR Westminster Holding, Inc.*, 7 S.W.3d 581, 597 (Tenn. Ct. App. 1999). In doing so, we will accord the contractual term “significant” its natural and ordinary meaning and construe it in the context of the entire contract. *Id.* Additionally, we will avoid any strained construction that creates ambiguities where none exist. *Id.*

We will first address the issue arising from Section 14(f)(i) of the Agreement, that being whether a significant change in the nature or scope of Gray’s authority occurred following the change of control of his authority. Our first observation is that the Agreement clearly affords Gray a good reason to terminate his employment if “a significant change” occurs. Thus, it is apparent that Gray need not prove that several significant changes occurred in the nature or scope of his authority. He only needs to prove one significant change. Accordingly, to be entitled to summary judgment, Gray must establish that no material facts are in dispute concerning at least one significant change.

Not all factual disputes will prevent the granting of summary judgment. For summary judgment to be improper, the disputed fact or facts must bear directly and materially upon the legal elements of the claim or defense being tested by the summary judgment motion. *Walker v. First State Bank*, 849 S.W.2d 337, 340 (Tenn. Ct. App. 1992) (citing *Macon County Livestock Mkt., Inc. v. Kentucky State Bank*, 724 S.W.2d 343 (Tenn. Ct. App. 1986)). To determine whether a fact is *material*, we look to the contract. By interpreting the Agreement between Gray and Shoney’s, we will make a fresh determination of whether there is a genuine issue as to a material fact. *See Hunter v. Brown*, 955 S.W.2d 49, 50-51 (Tenn. 1997).

As we noted in *Realty Shop*, in order to interpret a contract, the Court not only looks to the meaning of the words used in the document, we also look to the circumstances surrounding the formation of the contract to determine the intent of the parties and interpret the meaning of its content. *Realty Shop*, 7 S.W.3d at 597. The Chancellor recited numerous facts that are indicative of the parties’ intentions, especially that of Shoney’s, including:

- Shoney’s was experiencing financial and corporate difficulties. To keep its key executives, it replaced existing Management Retention Agreements (“MRA”) with exceptionally generous MRAs in order to entice its executives to ignore the risks to their careers and remain with the company during its uncertain times and during any “change in control” period with an acquiring company.
- Conditions at Shoney’s were such that, without the new MRA, Bernard Gray feared that Shoney’s might cut, entirely, his position as CIO.
- The MRA that Shoney’s offered Bernard Gray was drafted by Shoney’s, broad in scope and liberally worded in favor of Bernard Gray.

- The MRA induced Bernard Gray to stay at Shoney's by guaranteeing a particular compensation package if, within two years following a "Change in Control" (as specifically defined by the contract), Mr. Gray terminated his employment with Shoney's for "Good Reason."

As a consequence of the circumstances noted above, Shoney's intended to draft the Agreement most favorable to Gray to induce Gray to remain with the company during the turbulent times.

Having examined the circumstances surrounding the formation of the Agreement to determine the intent of the parties, we will now examine the meaning of its content, specifically the meaning of the word "significant" as used in the Agreement. *See Realty Shop*, 7 S.W.3d at 597. In doing so, we will accord the contractual term "significant" its natural and ordinary meaning and construe it in the context of the entire contract. *Id.*; *see Gouge v. Ryan*, 1 S.W.3d 663, 665 (Tenn. Ct. App. 1999).

To find the natural and ordinary meaning of "significant," we turn to the dictionary. *See Hogins v. Ross*, 988 S.W.2d 685, 687 (Tenn. Ct. App. 1998). According to Webster's Dictionary, "significant" means: (1) having meaning; or (2) having or likely to have influence or effect. *Webster's New International Dictionary* 2116 (3rd ed. 1971). Thus, a "significant" change in the nature or scope of Gray's authority would essentially be a change that has meaning or is likely to have effect on the nature or scope of his authority.

In April 2002, the change in control brought with it many changes to Shoney's. In the Memorandum Opinion granting Summary Judgment, the Chancellor concluded that significant changes had occurred for which there were no material facts in dispute. They include:

Changes in Gray's Research and Development Authority;
 Changes in Gray's Spending Authority;
 Change in Gray's Authority to Sell Used Equipment;
 Change in Gray's Authority Over Programs;
 Restructure of Gray's Department, Documentation of his Executive
 Authority, and Reporting Tier; and
 Change in Gray's Personnel Discretion.

We analyze each of the Chancellor's findings below, stating first and in bold the Chancellor's findings.

Changes in Gray's Research and Development Authority

Before the change in control, Gray had authority to initiate and pursue research and development opportunities without prior approval. Following the Change, Walker ordered that all new research and development be curtailed so that

Bernard Gray no longer had authority to initiate or pursue new projects without specific approval.

Shoney's claims that, *inter alia*, after the merger, budgetary concerns continued to impact Gray's department and caused new projects to be cancelled or suspended. It also states that the limitations after the change in control were temporary, cost saving measures.

The fact that budget concerns after the change of control affected Gray's authority or that many of the changes were temporary in nature does not give rise to a fact that is material to the claim upon which the summary judgment is predicated. *See Byrd v. Hall*, 847 S.W.2d 208, 214 (Tenn. 1993). Furthermore, Shoney's does not dispute that his authority changed or that limitations were placed on him after the change in control; they merely try to justify their actions. Whether the actions were justified as a result of Shoney's poor financial condition is not material to the fact at issue. What is at issue is whether changes in the nature or scope of Gray's authority were significant. Gray produced evidence of the significant changes, and Shoney's failed to produce any material facts that lead to a factual dispute.

We agree with the Chancellor that Shoney's response does not meet, overcome or diminish the significance of the facts asserted by Gray. Therefore, the undisputed fact is that after the change in control Gray no longer had the authority to initiate or pursue research and development opportunities. This constitutes a significant change in the nature and scope of Gray's authority because this change had influence and effect on his authority as the Chief Information Officer.

Changes in Gray's Spending Authority

Before, Bernard Gray had authority to spend up to \$15,000.00 (per expenditure) without prior approval and was not required to use a Capital Authorization, at all, for purchases under \$5,000.00. Following the Change, Gray was told that he had no authority to spend any money without prior approval.

Shoney's Walker admits that he changed Mr. Gray's authority for purchasing equipment by requiring him to submit a formal request to Deborah Locke on all purchases.

Shoney's claims that a material factual dispute arises because neither Walker nor Locke knew of Gray's pre-merger spending authority. In addition, Shoney's states that, after the merger, Gray did not attempt to make any capital expenditures. However, these claims have no bearing on whether a significant change in the nature or scope of Gray's spending authority occurred. Moreover, they admit that Gray's purchasing authority was limited after the change of control. While it seeks to provide a reason for the decision to limit Gray's authority, Shoney's failed to dispute the change in authority.

We therefore agree with the Chancellor that Shoney's response does not meet, overcome or diminish the significance of the facts asserted by Gray. Shoney's did not put forth evidence to dispute that this is a significant change in the nature or scope of Gray's authority. The undisputed fact is that Walker changed Gray's autonomous authority to purchase equipment by reducing it from \$15,000.00 to zero. This constitutes a significant change in the nature and scope of Gray's authority because it is clear that this change had influence and effect on his authority as the CIO.

Change in Gray's Authority to Sell Used Equipment

Before the Change, Gray had authority to sell used Information Services equipment under his own authority. Following the Change in Control, Gray was required to formally request permission to sell used equipment.

Walker admits that he changed Gray's authority as CIO to sell equipment and required him to provide written notice to not one, but to three superiors before selling anything.

Shoney's responds by stating that Gray's authority to sell used equipment was not taken away after the change in control, but that Walker merely implemented a new protocol in which sales must be approved by three of Gray's superiors. They also point out that Gray, in his deposition, believed that, in general, there should be some form of controls in place for selling company equipment. However, Shoney's does not dispute that Gray's authority changed or that limitations were placed on him after the change in control.

Post-merger, Gray's authority was, in fact, changed to the extent that he must first provide written notice to three superiors before selling anything. Also, whether Gray feels that there should be some form of control in place does not impact whether the nature and scope of his authority significantly changed.

We therefore agree with the Chancellor that Shoney's response does not meet, overcome or diminish the significance of the facts asserted by Gray. The discontinuation of his autonomous authority to sell Information Services department equipment constitutes a significant change in the nature and scope of Gray's authority because this change had influence and effect on his authority as the CIO.

Change in Gray's Authority Over Programs

Before the Change in Control, Gray supervised the operations of the 800 Customer Complaint line and the Mystery Shoppers Program for the Shoney's Restaurants. Following the Change, operations were removed from his supervision, and Gray no longer had any authority over them.

Shoney's admits that it eliminated the 800 line to cut costs; Shoney's admits that it outsourced the Mystery Shopper Program because it "was inadequate and did not provide the quality or depth of information that it needed"

Shoney's claims that the 800 Customer Complaint number and the Mystery Shoppers Program were not typical Information Services department functions, and in the past, these programs were handled by other departments. However, Shoney's does not dispute that Gray's authority over the complaint number and the program changed after the change in control.

Shoney's admits it removed Gray's authority over the 800 Customer Complaint number and the Mystery Shoppers Program. While it seeks to provide a reason for the decision to limit Gray's authority, the fact that these programs were run by different departments before being supervised by the Information Services department is irrelevant.

We therefore agree with the Chancellor that Shoney's response does not meet, overcome or diminish the significance of the facts asserted by Gray. Before the change in control, Gray had supervisory authority over the programs. After the change in control, he did not. This constitutes a significant change in the nature and scope of Gray's authority because this change had influence and effect on his authority as the CIO.

Restructure of Gray's Department, Documentation of Gray's Executive Authority,
and Reporting Tier

Before the Change in Control, Gray was considered a key executive of Shoney's, Inc. Following the Change, he was no longer considered a key executive of Shoney's, Inc. Before the Change, Gray and Ronald Walker both reported directly to the Chairman of the Board of Shoney's Inc., the publicly traded parent company. Following the Change in Control Gray reported directly to Mr. Walker, Chief Operating Officer of the privately held subsidiary corporation.

Gray contends that he was no longer a key executive, which he contends was a significant change to the nature and scope of his authority, because his department, the Information Services department was redeployed within the corporate structure to a subsidiary, Captain D's, and he no longer reported directly to the Chief Executive Officer of the parent company. Shoney's does not dispute the change in the corporate structure or to whom Gray was required to report. It however contends the change did not affect the nature or scope of Gray's authority.

The Chancellor concluded that Shoney's response does not meet, overcome or diminish the significance of the plaintiff's facts. We agree with the Chancellor. The change affected the level of importance of Gray's department when the whole Information Services department was removed from the direct supervision of the CEO of Shoney's and placed under the supervision of an officer

of a subsidiary entity, Captain D's. As a result, Gray reported to Walker, who was formerly on the same level in the corporate structure.

The loss of positional and organizational authority was a significant change in the nature and scope of Gray's authority because this change had influence and effect on his overall authority as the CIO.

Change in Gray's Personnel Discretion

Before the Change in Control, Bernard Gray had authority to use his discretion in certain personnel issues, including whether employee confidences should be kept confidential and the manner in which terminations were handled. Following the Change in Control, Bernard Gray no longer had authority to keep employee confidences confidential or to affect the way in which terminations were handled.

Shoney's does not offer any rebuttal evidence regarding the fact that, before the change in control, Gray was not required to divulge employees' confidences regarding their future employment decisions to Walker or other superiors. After the Change in Control, a valuable employee disclosed confidential information to Gray regarding his plan to leave Shoney's in an effort to vacate his position so that a Shoney's employee, who was soon to be terminated, could fill the employee's position in lieu of losing his job. When this was brought to Walker's attention, he told Gray that Gray must inform Walker of such employees' plans. Shoney's admits that, post-merger, Gray did not have the authority to keep such conversations confidential.

With regard to termination practices, Shoney's fails to offer evidence to rebut the fact that, before the merger, Gray had the authority to terminate Information Services department employees in a manner of his choosing. Pre-merger, Gray handled the termination of an employee in a private and individual manner, explaining that the reason for termination was not due to the employee's performance, but the financial condition of Shoney's. After the Change in Control, Shoney's admits that Gray no longer had the authority to terminate employees as he had done in the past. Instead, employees were brought into a room and notified of their termination together. In addition Gray was not allowed to speak to his terminated employees.

We are in agreement with the Chancellor that Shoney's response does not meet, overcome or diminish the significance of Gray's facts. The loss of discretion in both his ability to keep employee confidences and his authority to decide the manner in which Information Services department employees were terminated, was a significant change because the change had influence and effect on his authority as the CIO.

IN CONCLUSION

Although we found Shoney's brief provided a profoundly thorough statement of the facts and the oral argument of its counsel persuasive, as were Gray's brief and his counsel's argument, we have concluded as the Chancellor did that Shoney's failed to present *material* facts that bear directly on whether the changes in the nature or scope of Gray's authority were significant. In effect, the numerous facts Shoney's presented provided a factual detour, like a trip through the soup and salad bar, when the challenge to Gray's Motion for Summary Judgment required more substance, like a healthy portion of country fried steak. As a consequence, the elaborate factual detour left us to wonder, "Where's the beef?"

Because we have found that there are no material facts in dispute concerning whether a significant change occurred, indeed several significant changes in the nature or scope of Gray's authority occurred, we need not reach a conclusion as to whether Gray made a reasonable determination that, as a result of a change in circumstances significantly affecting his position, he was unable to exercise the authority, powers, function or duties attached to his position.

The judgment of the Chancery Court is affirmed, and this matter is remanded for further proceedings consistent with this opinion. Costs of appeal are assessed against Shoney's, Inc.

FRANK G. CLEMENT, JR., JUDGE